Examining the Ebb & Flow of Electronic Discovery: Tips, Tools, & Ethics

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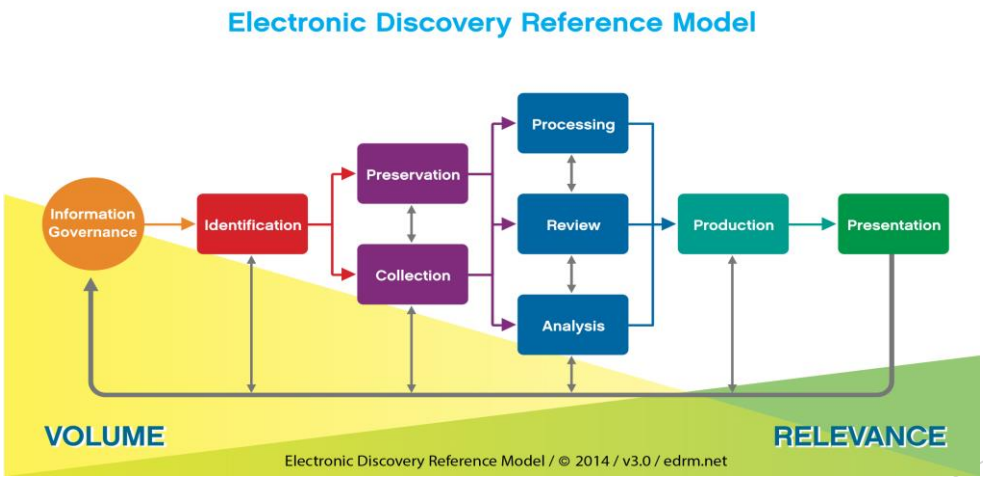
What Is E-Discovery?

- *Electronic* aspect of identifying, collecting and producing electronically stored information (ESI) in lawsuit
- Existing in a medium that can only be read by using computers, such as cache memory, hard drives, DVDs/CDs
- Can include emails, text messages, documents, presentations, databases, voicemail, audio and video files, social media postings, and websites
- Found on a wide variety of devices such as desktop and laptop computers, network servers, tablets, and phones

E-Discovery Process Influencers

- Size and nature of company
- Industry
- Civil or criminal
- Data Infrastructure - Is data centralized or widely dispersed? What are the data retention policies and how are they enforced? Are there dedicated internal IT resources to handle e-discovery tasks?
- Time constraints (production deadlines, retention schedules, resources available)

Typical E-Discovery Model



2015 Rules – FRCP 26(b), 37(e)

- Proportionality
  - *Goldilocks* Era – find "just right zone" of permitted discovery
- Cooperation by Communication



Key Takeaways With Rule Changes

- Think proportional and act proportional
- Talk about *true case value* with opposing counsel
- Have discussions with the judge
- Front-end your e-discovery work
- Make your discovery plan early (Rule 26(f) conference)
- Use honesty and diligence to navigate your way to the *Goldilocks zone*

ESI Requests Rules of Thumb

- What they must keep and what they must give you are different obligations
- Keep requests for production narrow and carefully crafted
- Laser-like requests mean that opponent must search with a spoon instead of a backhoe
- Be prepared to address proportionality objections
- Lose the boilerplate requests and objections

Liguria Foods v. Griffith Laboratories (N.D. Iowa Mar. 2017)

- "Obstructionist discovery responses" in civil cases are a "menacing scourge" that must be met in the future with "substantial sanctions"
- Stop using form objections, especially if they don't conform to new rules (or any rules)
- Instead, become an ambassador for changing the "boilerplate" discovery objection culture

Headaches With Email and Privilege

- Complications of separated emails and attachments when generally they should be viewed together
- Discrepancies in privilege between email body and attachment
- Review/production problems with email families
- Watch out for redaction traps
- May address specifically in an ESI/Rule 26 Agreement

FRCP 37(e)

- Neither remedial measures nor sanctions for failure to preserve relevant ESI available unless:
  - (1) the ESI should have been preserved in the anticipation or conduct of litigation; AND
  - (2) the ESI is lost because a party failed to take reasonable steps to preserve it; AND
  - (3) the ESI cannot be restored or replaced through additional discovery.
- No remedy available if party had no duty to preserve ESI, OR if relevant ESI is still available, OR if relevant ESI was lost despite party having taken reasonable steps to preserve it

Pension Committee v. Banc of America Securities (SDNY 2010)

- Provides criteria court should review in evaluating discovery conduct and determining sanctions
- Gross negligence failures – no written litigation hold, did not identify key players and preserve files, did not cease deletion of email or preserve records of former employees, did not preserve backup tapes (sole source of relevant info)

Rimkus Consulting v. Cammarata (S.D. Tex. Feb. 2010)

- Spoliation of evidence raises grave concerns
- Whether preservation or discovery conduct is acceptable depends on what is reasonable and that depends on whether what was done – or not done – was proportional to case and consistent with standards

Arrowhead Capital v. Seven Arts (SDNY Sept. 2016)

- Practice Pointers
  - Do not just sign response under Rule 26(g) based on forwarding documents that client finds and decides are relevant
  - Must closely supervise response
  - Signature vouches for reasonability of efforts – cannot sign unless you have knowledge of what was done

Louis Vuitton Malletier v. Dooney & Bourke, (SDNY Nov. 30, 2006)

- LV represented it searched for communications about accused products and had no such communications
- LV relied on own IT personnel and refused to use outside experts to extract emails in uncommon format (too expensive)
- Adverse inference instruction and fees sanction

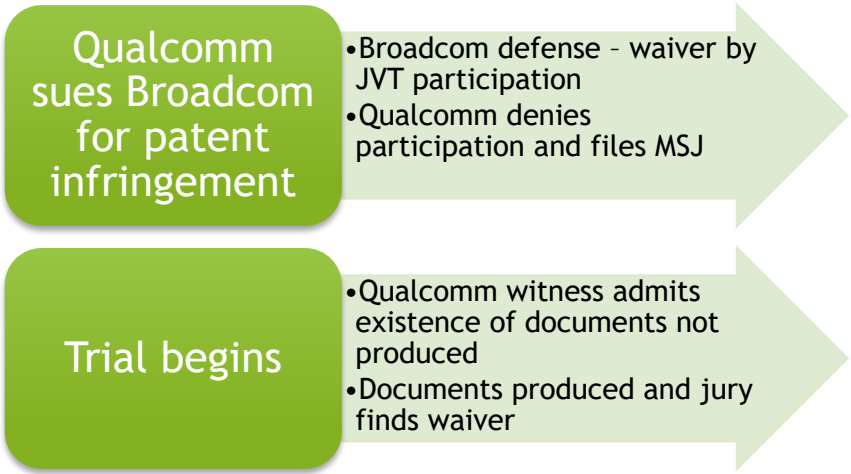
Hobie Cat v. Ins. Co. of the State of Pa. (S.D. Cal. Apr. 18, 2008)

- Insurer produces documents but none of adjuster's computer notes or claim activity log (usually kept electronically)
- Insurer insisted no activity logs/notes to be produced – provided affidavit to attest but later concedes existence
- Sanctions for making incorrect certifications regarding discovery responses, failure to timely supplement disclosures

Swofford v. Eslinger (M.D. Fla. 2009)

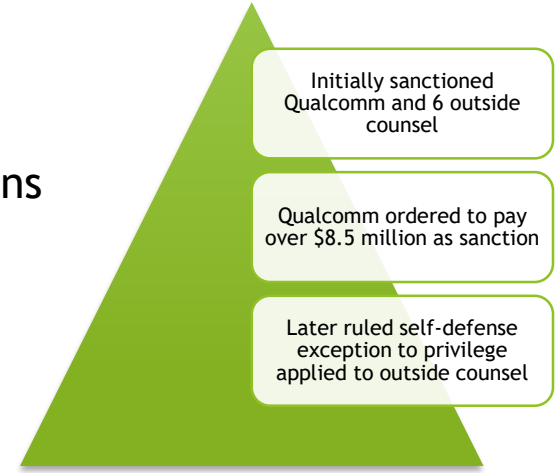
- Impose sanctions against defendants **and** in-house counsel for failure to preserve evidence
  - Did not appear as counsel in case
  - Did not send preservation letters to deputies involved in shooting and ESI destroyed on old laptops
  - Judge asked him questions at hearing – argued ignorance not bad faith
- Adverse inference instruction and monetary sanction
- Outside counsel not sanctioned – not retained until months after preservation letters sent and duty to preserve triggered

Qualcomm v. Broadcom (SD Cal.)



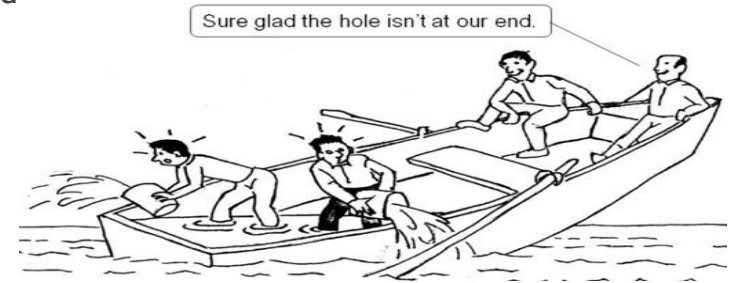
Qualcomm v. Broadcom

Sanctions



Qualcomm v. Broadcom – Problems with Counsel Actions

- No counsel met in person with Qualcomm employees likely to be key witnesses
- Lack of agreement on responsibility for document collection and production or to verify necessary discovery



Lessons to be Learned

"He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

Brown v. Allen,
344 U.S. 443, 537 (1953)



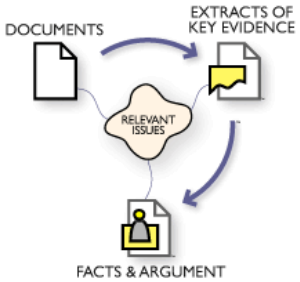
Lessons for All:
1. The Truth Matters

- Know whole truth and make accurate representations to other side, judge and jury
- Find responsive information and produce it
- Counsel as well as witnesses need to be prepared to face the truth



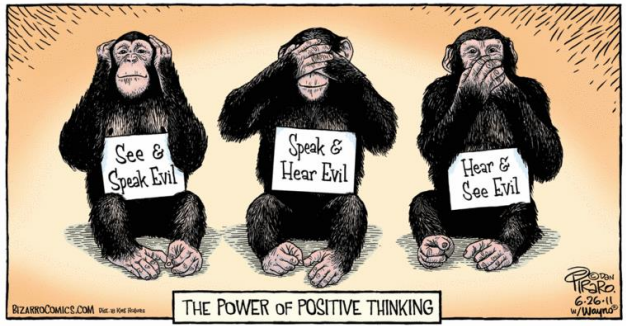
Lessons for All:
2. Err in Favor of Production

- If you have to consider whether to produce, probably should go ahead and produce it
  - Often less harmful to produce
  - May be discoverable but not necessarily admissible
- Courts tend toward requiring production if responsive to a party's claims or defenses



Lessons for All:
3. Responsibility for Ensuring Client Compliance with Discovery

- **CANNOT** blindly rely on client's collection and production (even "standard" procedures)
- **CANNOT** shield yourself from unhelpful/harmful documents



Lessons for All:
3. Responsibility for Ensuring Client Compliance with Discovery

- **MUST** reach agreement as to how to engage in discovery process
- **MUST** have sufficient control over discovery process and confirm compliance



Lessons for Outside Counsel:
4. Document Your Discovery Efforts

- Keep record of document search and collection efforts
- Possibly get client agreement that record may be disclosed if sufficiency of discovery efforts is later challenged



Lessons for Clients:
5. If You Don't Have a Plan, Make One

- **MUST** define who is responsible for ensuring discovery duties are carried out
- **MUST** get IT personnel involved
- **MUST** issue document hold notice at outset of litigation
- **MUST** inform employees that they have a duty to manage information in accordance with written policies – litigation or not

Lessons for Clients:
6. If You Have a Plan, Follow It

- Qualcomm allegedly had a plan in place for collecting documents in response to discovery requests
  - Qualcomm apparently did not fully follow plan
- **MUST** follow your plan – plan is only as effective as care given in executing plan



Social Media E-Discovery Sources

- Facebook, Instagram, Pinterest, LinkedIn, Twitter; messaging applications including general purpose (e.g., WhatsApp) and auto-deleting (e.g. Wickr) varieties
- Each social media account for each individual user can contain hundreds or thousands of pages of materials in a mishmash of formats
- Also have metadata fields for each file
- IP address logs (user activity) may be available too

Discoverability of Social Media

- Generally discoverable under same conditions and in the same ways as other evidence (FRCP 26(b)). If it's relevant, it's discoverable.
- In camera review – depends on court
- Password requests – generally disfavored
- Subpoenas to service providers –Stored Communications Act ("SCA") establishes privacy protections for electronic materials stored with third party service providers from government intrusion and third party access

How to Obtain Social Media E-Discovery

- Print out material or capture a screen image of it
- Use self-service export tools provided by social media platform instead
- Use specialized forensic collection software

Case Examples – Social Media

- *The Katiroll Co., Inc. v. Kati Roll & Platters Inc.* (D.N.J. 2011) - Defendant changed Facebook profile picture from one that included the dress the trademark dispute was over to one that did not. Plaintiff sought spoliation sanctions over that change.
- *Gatto v. United Airlines* (D.N.J. Mar. 25, 2013) - Plaintiff produced Facebook password to defendants so they could access, review, and print some agreed-upon materials. Plaintiff deactivated fearing hacking and could not restore.
- *Crowe v. Marquette Transportation* (E.D. La. Jan. 20, 2015) - Plaintiff deactivated his Facebook account days after receiving a discovery request to produce materials from it, and then, he claimed he did not "presently have a Facebook account."

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